TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 345.

[redacted] G. LANHAM, AS ADM'R OF THE ESTATE OF MARY LANHAM, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

J. P. McKEEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED SEPTEMBER 15, 1914.

(24,815)

(24,915)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 245.

PERRY G. LANHAM, AS ADM'R OF THE ESTATE OF MARY J. LANHAM, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

J. F. McKEEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1916.

a Filed Aug. 6, 1915. William M. Franklin, Clerk.

THE UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

The President of the United States of America to the Honorable Judges and Clerk of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record of the proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the State of Oklahoma, before you, being the highest court of law and equity of the said State in which a decision can be had in the said suit between Perry G. Lanham, as Administrator of the estate of Mary J. Lanham, deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, minors, by Perry G. Lanham, their legal guardian, and Viola Lanham and Gertrude Lanham, minors, by their legal guardian P. G. Lanham, plaintiffs in error in the Supreme Court of said State, and J. F. McKeel, as defendant in error in the Supreme Court of said State, wherein a judgment was rendered in said cause in favor of the said defendant in error J. F. McKeel, and against the above named plaintiffs in error in said court, affirming the judgment below and dismissing the action of the plaintiffs in error aforesaid in said court against the said defendant in error, and adjudging that the said plaintiffs in error take nothing by their said petition in error, and affirming in all things the judgment of the lower court in favor of said defendant in error J. F. McKeel at the cost of plaintiffs in error aforesaid, it appears therein that manifest error has happened to the great damage of the said plaintiffs in error, as by his petition and assignment of errors appears, and we being willing that the error, if any hath been committed, should be duly and speedily corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, then under your seal, distinctly and openly, you send the copy of the record of proceedings aforesaid, with all things concerning the same, duly authenticated and verified, so that you have the same at Washington, at said Supreme Court, within thirty days of the date hereof, that said record of proceedings aforesaid, being inspected by the Supreme Court, it may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, this 15th day of July, 1915, and the year of

the Independence of the United States of America the one hundred and fortieth.

[Seal of the United States District Court, Eastern District of Oklahoma.]

R. P. HARRISON,
Clerk U. S. District Court,
Eastern District of Oklahoma.

Allowed:

MATTHEW J. KANE,
Chief Justice of the Supreme Court
of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:

WILLIAM M. FRANKLIN,
Clerk of the Supreme Court of
the State of Oklahoma.

I, Wm. M. Franklin, Clerk of the Supreme Court of the *Supreme Court of the* State of Oklahoma do hereby certify that the above and foregoing writ of error was filed in my said office on 6th day of August, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court, State of Oklahoma.

[Endorsed:] Perry G. Lanham, adm'r, et al., vs. J. F. McKeel. Writ of Error.

b Filed Aug. 6, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3964.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Petition for Writ of Error.

The Petition of Perry G. Lanham, as Administrator of the estate of Mary J. Lanham, deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, minors, by Perry

G. Lanham, their legal guardian, and Viola Lanham and Gertrude Lanham, minors, by their legal guardian P. G. Lanham, by O. L. Rider, Geo. E. Rider and E. S. Hurt, Attorneys, hereby sets forth that on or about the 4th day of May, A. D., 1915, the Supreme Court of the State of Oklahoma made and entered a final order and judgment herein in favor of J. F. McKeel and against the above named petitioners, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said above named petitioners, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of Oklahoma is the highest court of said State of Oklahoma in which a decision in this suit and this matter could be had.

Wherefore, the above named petitioners pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Oklahoma, for the correction of errors so committed and complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 17th day of June, 1915.

O. L. RIDER,
GEO. E. RIDER, AND
E. S. HURT,
Attorneys for Above-named Petitioners.

Writ of error allowed upon the execution of a bond by petitioners in the sum of $1,000.00. Said bond, when approved, to act as a supersedeas.

Dated June 18th, 1915.

[SEAL.] (Signed) MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

(Signed) WM. M. FRANKLIN,
Clerk Supreme Court of the State of Oklahoma.

Filed Aug. 6, 1915. William M. Franklin, Clerk.

d Filed Aug. 6, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3964.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Assignment of Errors.

Perry G. Lanham, as Administrator of the Estate of Mary J. Lanham, deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, minors, by Perry G. Lanham, their legal guardian, and Viola Lanham and Gertrude Lanham, minors, by their legal guardian P. G. Lanham, the plaintiffs in error in this action, in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred in the decision, final order and judgment, and the proceedings had prior thereunto in this cause, to-wit:

The Supreme Court of the State of Oklahoma erred in holding and deciding that, where the Secretary of the Interior of the United States made an order removing the restrictions upon alienation of the lands of a three quarters blood Chickasaw Indian, which said order was dated March 26, 1908, and provided that it should be effective thirty days from date, the day of the order removing said restrictions should be included in computing the thirty day period during which the order of removal was not effective, and that a conveyance of lands by said Indian on April 25, 1908, was valid and conveyed good title to the defendant in error J. F. McKeel.

Wherefore, said plaintiffs in error pray that the judgment and order aforesaid, for the error aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be *e* reversed, annulled and held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment and order.

O. L. RIDER,
GEO. E. RIDER, AND
E. S. HURT,
Attorneys for Plaintiffs in Error.

Filed Aug. 6, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3964.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we, Perry G. Lanham, as Administrator of the estate of Mary J. Lanham, deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, minors, by Perry G. Lanham, their legal guardian, and Viola Lanham and Gertrude Lanham, minors, by their legal guardian P. G. Lanham, as principals and United States Fidelity and Guaranty Co., of Baltimore, Md., as surety, are held and firmly bound unto J. F. McKeel in the sum of One Thousand Dollars, to be paid to the said obligee, his representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

The condition of this obligation is such that whereas the above named plaintiffs in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma; now, if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

Witness our hands this June 24th, 1915.

(Signed) PERRY G. LANHAM,
As Administrator of the Estate of Mary J. Lanham, Deceased, and as Guardian of the Estates of Jimmie Lanham, Charles H. Lanham, Bessie Lanham, Manley Lanham, Viola Lanham, and Gertrude Lanham, Minors.
UNITED STATES FIDELITY AND GUARANTY CO.,
By G. E. BARNARD, *Agent, Surety.*

[SEAL OF SURETY CO.]

g I hereby approve the within and foregoing bond and surety this 22 day of July, 1915.

(Signed) MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
(Signed) WILLIAM M. FRANKLIN,
[SEAL.] *Clerk Supreme Court of the State of Oklahoma.*

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the original of the above and foregoing bond was lodged in my said office on the 6th day of August, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of State of Oklahoma.

h Filed Aug. 6, 1915. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, Sitting at Washington, D. C.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Citation to Defendant in Error.

The President of the United States to J. F. McKeel, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein Perry G. Lanham, as Administrator of the Estate of Mary J. Lanham, deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, minors, by Perry G. Lanham, their legal guardian, and Viola Lanham and Gertrude Lanham, minors, by their legal guardian P. G. Lanham, are plaintiffs in error, and you, the said J. F. McKeel, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma, this 22 day of July, 1915.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN,
Clerk Supreme Court of the State of Oklahoma.

I, J. F. McKeel, the undersigned, the defendant in error in the above entitled cause, do hereby acknowledge service upon me of the above citation.

Dated this 31 day of July, 1915.

J. F. McKEEL,
Defendant in Error.

[Endorsed:] Original. Perry G. Lanham, Adm'r, et al. vs. J. F. McKeel. Citation to Defendant in Error.

1 Filed May 11, 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

3964.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Petition in Error.

The said Perry G. Lanham, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, minors, by Perry G. Lanham, their legal guardian, and Viola Lanham and Gertrude Lanham, minors, by their legal guardian, P. G. Lanham, plaintiffs in error, complain of said defendant in error, J. F. McKeel, for that on the 16th day of November, 1911, at the regular November, 1911, Term of the District Court within and for Marshall County, Oklahoma, in a certain action then pending in the said court wherein the above named plaintiffs in error were plaintiffs and the above named defendant in error was defendant, judgment was rendered whereby it was considered, ordered and adjudged by said court that said plain-

tiffs in said action take nothing by their said action, and that said defendant have and recover of and from the plaintiffs his costs therein laid out and expended. A certified transcript of the record and the original case-made duly certified and attested and filed, is hereunto attached, marked "Exhibit A" and made a part of this petition in error; and the said above named plaintiffs in error aver that there is error in the said records and proceedings in this, to-wit:

1. Said court erred in overruling the motion of Plaintiffs in Error for a new trial.

2 2. Said court erred in giving the following instructions to the jury, to-wit:

"You are instructed that if you believe from the evidence that the said Mary J. Lanham executed said deed conveying said lands to C. H. Ennis on the 25th day of April, 1908, or on any other subsequent thereto, then it would be your duty in that event to find for the defendant. The order of the Secretary of the Interior removing the restrictions upon the right of the said Mary Jane Lanham to alienate her surplus allotment appears to have been approved by the Secretary of the Interior on March 26, 1908, and the deed in question purports to have been executed on April 25, 1908. The court instructs you that under the laws governing the right of any allottee to alienate their lands, the said Mary J. Lanham could not alienate the said lands prior to the said 25th day of April, 1908, for the reason that the restrictions had not been removed until that date, but if said deed was actually executed by said Mary J. Lanham on the said 25th day of April, 1908, or any time thereafter, then the same conveyed said lands to the said C. H. Ennis, and the same were conveyed by the said C. H. Ennis to the defendant, and the defendant would therefore be entitled to recover in this action. But if you should find that said deed was not executed by the said Mary J. Lanham or that the same was executed by her, but was executed prior to the 25th day of April, 1908, then in that event it would be your duty to find for the plaintiffs."

3. Said court erred in refusing to give the following instructions to the jury, asked for by the plaintiffs in error, to-wit:

"First. Gentlemen of the Jury, you are instructed in this case to return a verdict for the plaintiffs.

"Second. The jury are instructed if they find from the evidence that the order of the Secretary of the Interior, or his assistant, removing the restrictions upon the alienation of the land of Mary Jane Lanham in controversy in this action was dated March 26, 1908, to be effective thirty days from said March 26, 1908, that said order removing said restrictions did not go into effect, and the said Mary Jane Lanham did not have the right or power under the law to execute a deed conveying said land, until April 26, 1908."

4. Said court erred in overruling the demurrer to the answer.

5. Said court erred in admitting evidence on the part of the defendant in error.

6. Said court erred in refusing and ruling out competent and legal evidence on the part of plaintiffs in error.

7. Said court erred in overruling the Motion for a Continuance filed by said plaintiffs in error on November 16, 1911.

5 Wherefore, the plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, d that a judgment may be rendered in favor of the plaintiffs in ror and against the defendant in error, and that the plaintiffs in ror be restored to all rights they and each of them have lost by e rendition of such judgment, and for such other relief as to the urt may seem just.

GEO. E. RIDER,
E. S. HURT,
Attorneys for Plaintiffs in Error.

* * * * * * *

In the District Court of Marshall County, Oklahoma.

PERRY G. LANHAM et al., Plaintiff,
vs.
J. F. MCKEEL, Defendant.

Case-made.

Be it remembered, that heretofore, to-wit, on the 13th day of ctober, 1910, this plaintiff, P. G. Lanham et al., commenced this tion against said defendant, J. F. McKeel, by filing in the office the clerk of the District Court of Marshall County, Oklahoma, eir petition, which is in the words and figures following, to-wit:

TATE OF OKLAHOMA,
Marshall County:

In the District Court.

ERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian (and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian, P. G. Lanham), Plaintiffs,
vs.
J. F. MCKEEL, Defendant.

Petition.

Comes now the plaintiffs and show to the court as follows: that erry G. Lanham is the duly and legally appointed, qualified and cting Administrator of the estate of Mary J. Lanham, deceased; hat Jimmie Lanham, Charles H. Lanham, Bessie Lanham, Manley anham, Viola Lanham and Gertrude Lanham are minors, and re the heirs at law of said Mary J. Lanham, Deceased.

For cause of action plaintiffs state that the said Jimmie
7 Lanham, Charles H. Lanham, Bessie Lanham and Manley Lanham, Viola Lanham and Gertrude Lanham, as such heirs at law of Mary J. Lanham, deceased, have the legal and equitable estate in and to the following described real estate, in Marshall County, Oklahoma, to-wit:

The North one half of the south one half of the Northeast one fourth of Section Fifteen, in Township Six South, Range Five East of the Indian base and meridian, containing forty acres, more or less, and that the plaintiff, Perry G. Lanham, as Administrator of the estate of Mary J. Lanham, deceased, is, for the purposes of the administration of said estate, entitled to the immediate possession of said lands.

Plaintiffs further state that they have been damaged in the sum of $250.00 by said defendant unlawfully withholding said possession.

Plaintiffs further state that the said defendant has so unlawfully kept plaintiffs out of said possession for the past two years, and collected and used for his own benefit during said time the rents and profits arising from said real estate amounting to $250.00.

Wherefore plaintiffs pray judgment for the possession of said premises and for $250.00 damages for withholding possession, and for $250.00 for rents and profits, in all $500.00, and for costs, and other proper relief.

GEO. R. RIDER,
Attorney for Plaintiffs.

STATE OF OKLAHOMA,
Marshall County:

Perry G. Lanham, upon his oath states that he is the above named Administrator of the estate of Mary J. Lanham, deceased, and the legal Guardian of Jimmie, Charles H., Bessie and Manley Lanham, minors,—that he has read the above and foregoing petition,
8–10 and that the matters and things therein stated are true.

PERRY G. LANHAM.

Subscribed and sworn to before me this 12 day of October, 1910.

[SEAL.] N. W. WELCH,
District Clerk.

Endorsed on the back: Filed in Office of Clerk of District Court of Marshall County, Okla., Oct. 13, 1910. N. W. Welch, Clerk of Dist. Court.

* * * * * * *

STATE OF OKLAHOMA,
Marshall County:

In the District Court in and for said County and State.

ERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian; Viola Lanham and Gertrude Lanham, by Perry G. Lanham, Their Guardian, Plaintiffs,

vs.

J. F. MCKEEL, Defendant.

Answer.

Comes now J. F. McKeel and for answer to the petition of the laintiffs herein says:

First. That he denies all and singular the allegations in Plainff's Petition, which are inconsistent with the allegations of this nswer.

Second. Defendant says that the land in controversy in this cause as allotted to Mary Jane Lanham as a part of her Surplus Allotent; that on March 13, 1908, Dana H. Kelsey, U. S. Indian Agent ade an order removing the restrictions upon alienation of the llotment of Mary Jane Lanham and said order was by the Secreary of the Interior approved March 28, 1908, to be effective Thirty ays thereafter; that a copy of said order and Approval is hereto atched and marked Exhibit "A" and made a part of this Answer; hat thereafter on to-wit, April 25, 1908, when said order was in full orce and effect the said Mary Jane Lanham sold the said land by er Warranty Deed to C. H. Ennis; that a copy of said deed is hereto ttached marked Exhibit "B" and made a part of this answer; that C. H. Ennis afterward sold said lands to S. S. McDonald and
2 G. W. Cox who in turn afterward sold it to this Defendant; that this defendant is therefore the legal and equitable owner f said lands herein and in full possession and enjoyment thereof nd the Plaintiffs have no interest whatever in said premises.

Wherefore, having fully answered Defendant prays that he be ischarged with his costs.

J. F. MCKEEL.

J. F. McKeel says that he has read the above and foregoing anwer and that the allegations therein are true.

J. F. MCKEEL.

Subscribed and sworn to before me this the 9th day of November, 910.

_____,
Notary Public.

13 DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
UNION AGENCY,
MUSKOGEE, OKLAHOMA, March 13, 1908.

Number 6838.

Roll No. 1074.

In the Matter of the Application of MARY JANE LANHAM, a Citizen by Blood of the Chickasaw Nation, for the Removal of the Restrictions upon the Sale of Her Allotment, Except Homestead.

In accordance with the regulations approved by the Secretary of the Interior, May 12, 1904, in conformity to the provisions of the Act of Congress approved April 21, 1904 (33 Stats. 204) I have made a full investigation in connection with the application of Mary Jane Lanham, a citizen by blood of the Chickasaw Nation for the removal of the restrictions upon the alienation of her allotment (except her homestead) and am, as the result of that investigation, satisfied that the removal of restrictions upon the alienation of her allotted lands, except her homestead, will be for the best interests of the allottee, and I so recommend. The approval of this certificate does not in any manner determine the right of the allottee to any particular tract of land.

DANA H. KELSEY,
United States Indian Agent.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 26, 1908.

Approved: This approval to be effective thirty days from date.

JESSE E. WILSON,
Acting Secretary of the Interior.

Exhibit "A."

14 This indenture, made this 25th day of April, A. D., 1908, between Mary Jane Lanham of Pontotoc County, in the State of Oklahoma, of the first part and C. H. Ennis, of Pontotoc County, Oklahoma, of the second part.

Witnesseth, that said party of the first part in consideration of the sum of Six Hundred and fifty Dollars the receipt of which is hereby acknowledged does by these presents grant bargain sell and convey unto the said party of the second part his heirs and assigns all the following described real estate, situated in the County of Marshall and State of Oklahoma, to-wit: the North Hald of the south half of the North East Quarter of Section 15, Twp. 6 South, and Range 5 East Chickasaw Nation.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining forever. And said Mary Jane Lanham for herself, her heirs, executors and administrators does hereby

covenant, promise and agree to and with the said party of the second part, that at the delivery of these presents she is lawfully seized in her own right of an absolute and indefeasible estate of inheritance, in fee simple, of in and to all and singular the above granted and described premises, with the appurtenances, that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estate, judgments, taxes, assessments and incumbrances of what nature and kind soever except Oil and gas lease and that she will warrant and forever defend the same unto said party of the second part his heirs and assigns and against said party of the first part his heirs and all and every person or persons whomsoever, lawfully claiming or to claim the same except as above.

15 In witness whereof, the said party of the first part has hereunto set her hand the day and year first above written.

MARY JANE LANHAM.

Acknowledgment.

STATE OF OKLAHOMA,
Pontotoc County, ss:

Before me James E. Webb, a Notary Public, in and for said county and state on this 25th day of April, A. D. 1908, Personally appeared Mary Jane Lanham single and unmarried to me known to be the identical person who executed the within and foregoing instrument, and acknowledged that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and date above written.

JAMES E. WEBB,
Notary Public, of Pontotoc County, Oklahoma.

My commission expires June 22, 1911.

Exhibit "B."

Said Answer is endorsed on the back: "Filed in Office of Clerk of District Court of Marshall County, Okla., Nov. 10, 1910. N. W. Welch, Clerk of Dist. Court, by A. Alsup, Deputy."

16 That thereafter and on, to-wit, the 23rd day of November, 1910, the plaintiff files herein Demurrer to Answer, which Demurrer is in the words and figures following, towit:

STATE OF OKLAHOMA,
Marshall County:

In the District Court.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, Plaintiffs,

vs.

J. F. MCKEEL, Defendant.

Demurrer to Answer.

Comes now the plaintiffs above named and demur to the defense set out in the answer of defendant herein, and for ground of demurrer state that the same is insufficient, because it does not state facts sufficient to constitute a defense to the action.

GEO. E. RIDER,
Attorney for Plaintiffs.

Endorsed: "Filed in Office of Clerk of District Court of Marshall County, Okla., Nov. 23, 1910. N. W. Welch, Clerk of Dist. Court, by A. P. Alsup, Deputy."

Said demurrer coming on to be heard on April Fourth, 1911, in open court, both parties by their attornies being present, was by the court, after due consideration and hearing overruled, to which action of the court the plaintiffs at the time duly excepted, all of which appears on the Journal of said Court in Book 2, Page 104.

17–134 That thereafter, and on to-wit, the 5th day of April, 1911, the plaintiff- filed herein Reply to the Answer of the Defendant heretofore filed herein, and said Reply appears in the following words and figures, to-wit:—

STATE OF OKLAHOMA,
Marshall County:

In the District Court.

No. 300.

PERRY G. LANHAM, Adm'r, et al.,

vs.

J. F. MCKEEL.

Reply.

Comes now the plaintiffs and for reply to the answer of the defendant herein state that they deny each and every affirmative allegation in said answer contained.

Second. For a further reply the plaintiffs state that the purported deed attached to said defendant's answer, purporting to be a deed executed by Mary Jane Lanham to C. H. Ennis, conveying the lands described in the petition herein, was not in fact executed by said Mary Jane Lanham, and that the same is a forged instrument; and that the said Mary Lane Lanham never at any time conveyed said lands to said Ennis or other person, and that the title to said lands was in her at the time of her death.

GEO. E. RIDER,
Attorney for Plaintiffs.

Endorsed: "Filed in Office of Clerk of District Court of Marshall County, Okla., Apr. 5, 1911. N. W. Welch, Clerk of Dist. Court."

* * * * * * *

135 That at the proper time, and on, to-wit, the 16th day of November, 1911, and within three days after the rendition of said verdict of the jury hereinbefore set out, and during said November, 1911, term of said court, said plaintiffs filed in said court in said cause, their motion for a new trial, which said motion is in the words and figures following, to-wit:

STATE OF OKLAHOMA,
Marshall County:

In the District Court.

No. 300.

PERRY G. LANHAM, Adm'r, et al.,
vs.
J. F. MCKEEL.

Motion for New Trial.

Comes now said plaintiffs and moves the court to vacate and set aside the verdict and judgment rendered herein on the 16th day of November, 1911, and to grant a new trial for the following causes which affect materially the substantial rights of said plaintiffs.

First. That the verdict herein is not sustained by sufficient evidence and is contrary to law.

Second. Error of law occurring at the trial and excepted to by plaintiffs.

Third. Error of the court in giving the instruction excepted to by the plaintiffs at the trial.

Fourth. Error of the court in refusing to give instructions requested by plaintiffs and refused by the court at the trial.

Fifth. Error of the court in refusing to grant the plaintiffs a continuance as applied for.

RIDER & HURT.

Proper File Mark. Nov. 16, 1911.

136 The Journal Entry of the Trial and covering the Overruling of the Plaintiffs' Motion for a New Trial, judgment, Granting extension of time in which to perfect case-made for appeal, etc., appear in the following words and figures, to-wit:—

137 In the District Court of Marshall County, State of Oklahoma.

No. 300.

P. G. LANHAM, Adm'r,
vs.
J. F. McKEEL.

Now on this 16th day of November, 1911, comes both plaintiff and defendant in person and by their attorneys of record, leave of court being first obtained, the plaintiff files a motion for continuance of this cause, and the court after hearing said motion, and being fully advised thereon, does hereby order that said motion be, and the same is hereby overruled, to which the plaintiff excepts. Thereupon, both sides announce ready for trial and a jury of twelve good and lawful men are duly sworn, drawn and empanelled for the trial of this cause, said jury being composed of the following named persons, to-wit:

J. L. Carter, T. B. Farris, Joe Malone, H. F. Fultz, W. W. Hicks, J. H. Gallop, S. D. Long, C. H. Duren, J. F. Wood, A. E. Devault, M. S. Etheridge, and A. H. Rollins.

And the jury after hearing the testimony of witnesses duly sworn and examined in open court, and the instructions of the court, retire to consider their verdict, and afterwards, to-wit, on the said day, said jury returned into open court their verdict in this case, which verdict is upon order of the court, duly filed, recorded and read aloud in open court by the clerk, and is in words and figures as follows, to-wit:

"No. —.

PERRY G. LANHAM et al., Plaintiff-,
vs.
J. F. McKEEL, Defendant.

Verdict.

138 We, the jury lawfully empanelled and sworn in the above entitled cause upon our oaths do find from the law and the evidence in favor of defendant.

S. D. LONG.
J. S. MALONE.
A. E. DEVAULT.
A. H. ROLLINS.
J. L. CARTER.
M. S. ETHERIDGE.
J. F. WOOD.
H. F. FULTZ.
C. H. DUREN.

Whereupon the jury are discharged by the court from further consideration of this case.

It is therefore considered, ordered and adjudged by the court that the plaintiff- in this action take nothing by this suit and that the defendant do have and recover of and from the plaintiff- his costs herein laid out and expended, for all of which let execution issue in due course.

(Signed) A. H. FERGUSON, *Judge.*

All of which appears in the Journal of said Court Book 2, Page 366.

139–153 STATE OF OKLAHOMA,
Marshall County:

In the District Court.

No. 300.

PERRY G. LANHAM, Adm'r,
vs.
J. F. MCKEEL.

Now on this the 16th day of November, 1911, comes the plaintiff by his attorneys of record and leave of court being first obtained and files his motion for a new trial in this cause, and the court after hearing said motion and being fully advised thereon finds that the same should be overruled.

It is therefore by the court, considered, ordered, and adjudged that said motion for a new trial herein be, and the same is hereby overruled, to which ruling of the court the plaintiff duly excepted and prayed an appeal of this cause to the Supreme Court of the State of Oklahoma. Thereupon the plaintiff asks and is by the court upon good cause shown given sixty days from this date within which to prepare and serve case-made; the defendant is given ten days thereafter in which to suggest amendments to said case-made, the same to be settled and signed upon five days' notice in writing by either party to the other.

It is further ordered by the court that *that* the plaintiff's appeal bond herein be and the same is hereby set at the sum of One Hundred Dollars and the plaintiff is given twenty days from this date to make and file said bond as provided by law.

(Signed) A. H. FERGUSON, *Judge.*

The above and foregoing being the Journal Entry to be found on page 367 of Book 2 of said Court.

* * * * * * *

154 Filed Feb. 23, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3964.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, et al., Plaintiffs in Error,

—

J. F. MCKEEL, Defendant in Error.

A deed conveying her surplus allotment made, executed and delivered by a Choctaw Indian of three-fourths blood before the removal of restrictions upon her power to alienate the same, in violation of Act of Congress June 28, 1898 (c. 517, Sec. 29, 30 U. S. St. at L., p. 507) and Act of Congress, July 1, 1902, (c. 1362, sec. 15, 16, 32 St. at L. (U. S.) p. 643) is void.

(Syllabus by the court.)

Error from the District Court of Marshall County.

A. H. Ferguson, Judge.

Reversed.

Geo. E. Rider and E. S. Hurt, Attorneys for Plaintiffs in Error.

C. H. Ennis, J. E. Webb, J. F. McKeel, Attorneys for Defendants in Error.

Opinion of the Court.

By TURNER, *J.:*

On October 13, 1910, in the District Court of Marshall County, Perry G. Lanham, as administrator of the estate of Mary J. Lanham, deceased, and his six minor children by himself as their guardian, plaintiffs in error, sued J. F. McKeel, defendant in error in ejectment for the surplus allotment of Mary J. Lanham, the mother of the minors, and for $250. damages for its unlawful detention. For answer, after admitting the land to be the surplus allotment of Mary J. Lanham, the mother of the minors, as stated, defendant pleaded that on March 13, 1908, Dana H. Kelsey, the United States Indian Agent, made an order removing the restrictions on the alienation of the land in question, which order was duly approved by the Secretary of the Interior on March 26, 1908, to be effective thirty days from date. He alleged that thereafter, to-wit on April 25th, 1908, when said order was in full force and effect said Mary J. Lanham sold and conveyed said land by warranty deed to one Ennis from whom he deraigned title, in virtue of all of which he says plaintiffs are not entitled to recover. After a general demurrer thereto filed and overruled, plaintiffs replied by a general denial and alleged that the deed from Mary J. Lanham to said Ennis

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was a forgery. After one continuance had at the request of plaintiffs they, on November 16, 1911, made another application to continue the cause, which was overruled. There was trial to a jury and judgment for defendant and plaintiffs bring the case here. Both sides concede that the mother was a three-fourths blood Choctaw and that the lands in controversy were inalienable because of the Act of Congress approved April 2, 1904, unless the restrictions upon its alienation were removed by order of the Secretary of the Interior. Assuming at this time that the deed from Mary J. Lanham to Ennis was duly made, executed and delivered by her to him on April 25, 1908, the question of law involved is, the order removing restrictions upon the alienation of the land described therein being approved March 26, 1908 "to be effective thirty days after date", was the deed effective to pass the title? It was not. This for the reason that neither inclusive nor exclusive of the date of the approval of the order removing restrictions had thirty days expired at the time the deed was executed. The deed is void as in violation Act of Congress approved June 28, 1908. The law in this case is governed by Simmons et al. v. Whittington, 27 Okla. 356;

Reversed with directions to proceed in conformity to this opinion. All The Justices Concur.

156 Filed May 4, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3964.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, et al., Plaintiffs in Error,

v.

J. F. MCKEEL, Defendant in Error.

1. On March 13, 1908 the United States Indian Agent made an order removing the restrictions on alienation of the surplus lands of a Choctaw Indian of three-fourths blood, which said order was duly approved by the Secretary of the Interior on March 26, 1908, "to be effective thirty days from date." On April 25, 1908, she made executed and delivered a warranty deed to said lands, Held, That her title to said lands was thereby conveyed,—following Baker v. Hammett et al., 23 Okla. 480.

2. The word "from," in its literal and restricted sense generally means exclusive, but it may be used in a connection that means inclusive and where, as here, the allottee could have alienated her allotment on March 26, 1908 after approval by the Secretary, but for the thirty day limitation imposed by the approval of the Secretary, that day will be included within the thirty days.

Error from the District Court of Marshall County.

A. H. Ferguson, Judge.

Affirmed.

Geo. E. Rider and E. S. Hurt, Attorneys for Plaintiffs in Error.
C. H. Ennis, J. E. Webb and J. F. McKeel, Attorneys for Defendant in Error.

Order of the Court on Rehearing.

By TURNER, *J.:*

On October 13, 1910, in the District Court of Marshall County, Perry G. Lanham, as administrator of the estate of Mary J. Lanham, deceased, and his six minor children by himself as their guardian, plaintiffs in error, sued J. F. McKeel, defendant in error, in ejectment for the surplus allotment of Mary J. Lanham, the mother of the minors, and for $250.00 damages for its unlawful detention. For answer, after admitting the land to be the
157 surplus allotment of Mary J. Lanham, the mother of the minors, as stated, defendant pleaded that on March 13, 1908, Dana H. Kelsey, the United States Indian Agent, made an order removing the restrictions on the alienation of the land in question, which order was duly approved by the Secretary of the Interior on March 26, 1908, to be effective thirty days from date. He alleged that thereafter, to-wit on April 25, 1908, when said order was in full force and effect said Mary J. Lanham sold and conveyed said land by warranty deed to one Ennis from whom he deraigned title, in virtue of all of which he says plaintiffs are not entitled to recover. After a general demurrer thereto filed and overruled, plaintiffs replied by a general denial and alleged that the deed from Mary J. Lanham to said Ennis was a forgery. After one continuance had at the request of plaintiffs they, on November 16, 1911, made another application to continue the cause, which was overruled. There was trial to a jury and judgment for defendant and plaintiffs *being* the case here. Both sides concede that the mother was a three fourths blood Choctaw Indian and that the land in controversy was inalienable because of the Act of Congress approved April 2, 1904, unless the restrictions upon its alienation were removed by order of the Secretary of the Interior. As we see no reason to disturb the finding of the jury that the deed from Mary J. Lanham to Ennis of date April 25, 1908, was not a forgery, the order removing restrictions upon the alienation of the land described therein being approved March 26, 1908, "to be effective thirty days from date," was the deed effective to pass title? It was, for the reason that inclusive of the day of the approval of the order removing restrictions thirty days had expired at the time the deed was executed. And such day should be included in computing the thirty day period during which the order of removal was not effective. Such was in effect our holding in Baker v. Hammett et al., 23 Okla. 480, following Taylor v. Brown, 147 U. S. 640, 13 Sup.
158 Ct. 549, 37 L. Ed. 313. Speaking to that case this court said: "The theory upon which the Supreme Court of the United

States held that the day of the date that the patent was issued should be included seems to be that except for the limitation taking effect, at the same moment with the delivery of the patent, the patentee could have alienated the land on receipt of the patent."

And so we say that, as the allottee in this case could have alienated her allotment on March 26, 1908, after approval but for the thirty day limitation imposed in the approval of the Secretary, the case falls squarely within the reason of the rule announced in those cases. It follows that the judgment of the trial court was right, and finding no error in the record, the same is affirmed.

All the justices concur.

159 Supreme Court, April Term, 1915, May 4th, 1915, Seventeenth Judicial Day.

No. 3964.

PERRY G. LANHAM et al., Plaintiffs in Error,
vs.
J. F. MCKEEL, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record, briefs and petition for rehearing.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Turner, J.

All the Justices concur except Hardy, J., disqualified.

160 & 161 *Return to Writ of Error.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, called for in praecipe for transcript.

Witness my hand and the seal of the Supreme Court of the State of Oklahoma, this 11th day of August, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court, State of Oklahoma.

* * * * * * *

162 In the Supreme Court of the United States, October Term, 1915.

No. 632.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian, P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Designation by Plaintiffs in Error of Parts of Record to be Printed.

To the Clerk of the Supreme Court:

The plaintiffs in error above named hereby file with you a statement of the errors on which they intend to rely, and the parts of the record which they think necessary for the consideration thereof, as follows, to-wit:

First. Return to writ of error.

Second. Citation and acknowledgement.

Third. Petition for Writ of Error, and allowance thereof, fixing bond.

Fourth. Assignment of Error.

Fifth. Writ of Error.

Sixth. Bond on writ of error.

Seventh. The original petition filed by plaintiffs in error in District Court of Marshall County, Okla., on Oct. 13, 1910.

Eighth. Answer of Defendant, filed on Nov. 10, 1910, and Exhibits A and B thereto.

Ninth. Demurrer to answer, and ruling of trial court thereon.

Tenth. Reply of plaintiffs to answer, filed April 5, 1911.

Eleventh. Abstract of the evidence on the trial of said cause, as follows, to-wit:

NEWT KYLER, a witness for plaintiffs in error, testified:

In the year 1908 I was working for and living with Jane Lanham at her place three miles east of Stratford and 20 miles west of Ada, Oklahoma. I know C. H. Ennis and J. E. Webb. About the middle of April, 1908, I met Ennis and Webb as I was going
163 from Mrs. Lanham's house, coming toward her house. After that time, on Saturday, April 25, 1908, Mr. Webb was there again. Mrs. Lanham, at that time was sick, but was able to sit up. Mr. Webb was there about an hour and a half. No papers were signed on that day by Mrs. Lanham that I saw. I was in the same room with them all the time Webb was there, except when I went to the kitchen to eat my dinner, and when I went to the barn to feed the horses. I was not called upon to witness any signatures on that

day by Mr. Webb. Ad Tyson and his wife were there that day. Webb got there about half past 11 o'clock.

BESSIE LANHAM, one of the plaintiffs in error, testified: I am about 13 years of age. Perry Lanham is my father and Mary J. Lanham, who died about a year ago, was my mother. In 1908, on one occasion, Mr. Ennis and Mr. Webb came to my mother's house together, and after that Mr. Webb came by himself. Ad Tyson and his wife were there the time Mr. Webb came by himself. They were my uncle and aunt. My mother on that day signed no papers that I knew of. My mother was sick on that day, and had been sick a good while. Newt Kyler was working for my mother at that time, and was there on that day. I was not in the room with Mr. Webb and my mother all of the time he was there. I was ironing in the kitchen and the door was not open all of the time. I do not remember the day of the month Webb was there, but it was in April, and on Saturday.

CHARLES LANHAM, one of the plaintiffs in error, testified: I am 18 years of age. Am a son of Perry and Jane Lanham. In March and April, 1908, I was living with my mother. Mr. Webb came to my mother's house in March or April, 1908, on Saturday, about 11 o'clock a. m. He was there about 25 minutes before I went to the house. Kyler, Ad Tyson and wife were there while Webb was there. He stayed about an hour and a half. Webb is a lawyer. Ennis is the man that has cross-examined me. The name of their firm is Webb & Ennis, and they are the attorneys who got the divorce of my mother from my father. They are also the firm that made application to have my mother's restrictions removed. I don't know what my mother did about signing any papers for Webb the day he was there, only that about a month afterwards she said she did not sign any.

164 SUSIE VIRGINIA LANHAM, a witness for plaintiffs in error, testified:

I married the brother of P. G. Lanham. I was at the house of Mary Jane Lanham several times in March and April of 1908. She had spells with her heart, and was under the care of a physician part of the time.

PERRY G. LANHAM, one of the plaintiffs in error, testified:

I live at Wynnewood. Mary Jane Lanham died March 26th or 28th, 1910. I am administrator of her estate, and the legal guardian of the minor plaintiffs. I am familiar with the handwriting of Mary J. Lanham. Have seen her write her name frequently. We were husband and wife from 1889 until 1906. She could read and write. I have examined the signature to the deed relied upon by defendant which is now before me, and which purports to be the signature of Mary J. Lanham, and it is not her handwriting. The rental value of the 40 acres involved in this suit is $3 per acre per year.

On Monday, April 27, 1908, I was at Mary J. Lanham's place, and Mr. Webb was not there on that day.

J. E. WEBB, a witness for defendant in error, testified:

I live at Ada, and am an attorney at law. Have been practicing 7 years. I have known Mary J. Lanham about 9 or 10 years. I was acquainted with her on April 25, 1908. I was at her house on that day. Newt Kyler, a young man working there, was there, and Mr. Tyson and his wife came in, and Charley, Bessie, Manley and Viola Lanham, and Mrs. Lanham and myself, were there. No one went out there with me. I was a Notary Public at that time. I was present when the deed relied upon by the defendant was signed. It was signed by Mary Jane Lanham. I took the acknowledgement of Mary Jane Lanham to that deed. I am familiar with the handwriting of Mrs. Lanham. Mrs. Lanham was up when I got there, and was up when I left. I was there about an hour and a half. The time I was there an hour and a half was the 25th day of April, 1908, and this deed relied on by the defendant in this case was executed by Mary J. Lanham on that day at that time. I left there about 1 o'clock in the afternoon, and Mary J. Lanham, before that time, on that day, executed this deed. The entire deed was prepared before I went there, except the signature. Mr. Ennis prepared the acknowledgement to the deed on the day before. I signed the acknowledgement after I returned home, and placed my seal thereon.

I was not back to her house on Monday, April 27, 1908,
165 and did not see her on that date. She did not execute this deed on Monday, April 27th. I was not at her house on or about April 15th. I was there 30 or 40 days before the 25th day of April. I was the attorney representing Mrs. Mary Jane Lanham in having her restrictions removed by the Interior Department for the land in controversy. Thirty or 40 days before I went out to have the deed executed the order removing restrictions was in my possession. I went to her house and got the order removing restrictions. No deed was signed on that day. At the time I took her acknowledgement as Notary Public I was her attorney.

C. H. ENNIS, a witness for the defendant in error, testified:

I live at Shawnee, and am a lawyer. I knew Mary J. Lanham. The firm of which I was a member transacted her business. Mr. Webb handled most of the matters, although I have done some of it in an advisory capacity, and probably in drawing up a good many papers. I am familiar with her handwriting. I never was at the home of Mrs. Lanham with Mr. Webb as testified by Mr. Newt Kyler.

I am the same Ennis that is mentioned in the deed in question as the grantee. I am one of the attorneys representing Mr. McKeel, the defendant in this case, inasmuch as I am on the warranty deed. Mr. Webb, the witness who just preceded me, is also an attorney in this case for Mr. McKeel, the defendant.

The Plaintiffs in Error also introduced in evidence the Final Rolls of Citizens and Freedmen of the Five Civilized Tribes in Indian Territory, prepared by the Commission and Commissioner to the Five Civilized Tribes and approved by the Secretary of the Interior on or prior to March 4, 1907, in the volume compl*ie*d and printed under the authority conferred by the Act of Congress approved June 21, 1906, showing, on page 176, that Mary Jane Lanham was enrolled on Chickasaw Roll, opposite Number 1074, age 31 years at her nearest birthday to September 25, 1902, sex female, and three fourths Indian blood, Census Card 351.

The Defendant in Error also introduced the allotment patent, No. 4,444, issued to Mary J. Lanham, covering the lands in controversy; also the original order of the Secretary of the Interior removing restrictions, and being the same instrument that is attached to Answer of Defendant as Exhibit A. Also, deed from C. H.
166 Ennis to George W. Cox and S. S. McDonald covering land in question. Also record of deed from George W. Cox and S. S. McDonald to J. F. McKeel, defendant in error.

Twelfth. The requested instructions of plaintiff- in error, Nos. 1 and 2, and exceptions thereto, as follows

1. Gentlemen of the Jury, you are instructed in this case to return a verdict for the plaintiffs.

Refused and excepted to by plaintiffs.

2. The jury are instructed if they find from the evidence that the order of the Secretary of the Interior, or his Assistant, removing the restrictions upon the alienation of the land of Mary Jane Lanham in controversy in this action was dated March 26, 1908, to be effective thirty days from said March 26, 1908, that said order removing said restrictions did not go into effect, and the said Mary Jane Lanham did not have the right or power under the law to execute a deed conveying said land, until April 26, 1908.

Refused and excepted to by plaintiffs.

Thirteenth. The Instruction given by the trial court to the jury, as follows, to-wit:

You are instructed that if you believe from the evidence that the said Mary J. Lanham executed said deed conveying said lands to C. H. Ennis on the 25th day of April, 1908, or any other date subsequent thereto, then it would be your duty in that event to find for the defendant. The order of the Secretary of the Interior removing the restrictions upon the right of the said Mary Jane Lanham to alienate her surplus allotment appears to have been approved on March 26, 1908, and the deed in question purports to have been executed on April 25, 1908. The court instructs you that under the law governing the right of any allottee to alienate their lands, the said Mary J. Lanham could not alienate the said lands prior to the said 25th day of April, 1908, for the reason that the restrictions had not been removed until that date, but that if said deed was actually executed by said Mary J. Lanham on the said 25th day of April, 1908, or any time thereafter, then the same conveyed said lands to

the said C. H. Ennis, and the same were conveyed by the
167 said C. H. Ennis to the defendant, and the defendant would therefore be entitled to recover in this action. But if you should find that the said deed was not executed by the said Mary J. Lanham, or that the same was executed by her, but was executed prior to the 25th day of April, 1908, that in that event it would be your duty to find for the plaintiff-.

Plaintiffs excepted to that part of said instruction which stated to the jury that if said deed was executed by said Mary J. Lanham on the 25th day of April, 1908, or any time thereafter, then said deed conveyed said lands to C. H. Ennis.

Fourteenth. The Jo-rnal entry of the trial and judgment of the district court of Marshall County, Oklahoma.

Fifteenth. The Motion for New Trial filed Nov. 16, 1911, by plaintiffs in error in said district court.

Sixteenth. Journal entry overruling motion for new trial, showing exception thereto, and appeal to State Supreme Court.

Seventeenth. Petition in Error in the State Supreme Court.

Eighteenth. Decision of State Supreme Court reversing judgment of the district court of Marshall County, Oklahoma.

Nineteenth. Decision of State Supreme Court, on rehearing, affirming said judgment.

Twentieth. Journal Entry of affirmance of judgment in the State Supreme Court.

Twenty-first. Certificate of Clerk of State Supreme Court.

O. L. RIDER,
GEO. E. RIDER, AND
E. S. HURT,
Attorneys for Plaintiffs in Error.

168 In the Supreme Court of the United States, October, 1915, Term.

No. 632.

PERRY G. LANHAM, as Administrator of the Estate of Mary J. Lanham, Deceased, and Jimmie Lanham, Charles H. Lanham, Bessie Lanham, and Manley Lanham, Minors, by Perry G. Lanham, Their Legal Guardian, and Viola Lanham and Gertrude Lanham, Minors, by Their Legal Guardian, P. G. Lanham, Plaintiffs in Error,

vs.

J. F. MCKEEL, Defendant in Error.

Agreement.

The undersigned Defendant in Error does hereby accept service of a copy of the within and foregoing statement of the errors on which the plaintiffs in error intend to rely, and the parts of the record which they think necessary for the consideration thereof, and

which said plaintiffs in error will ask the Clerk of the Supreme Court to have printed from the transcript now on file with said Clerk; and we do hereby agree that the Clerk of the Supreme Court of the United States may at once print, or have printed, all those matters and things contained and referred to in said statement and parts of record thought necessary for the consideration thereof, as aforesaid, without further delay, it being hereby agreed that these matters and things shall constitute the record proper on which the Supreme Court of the United States may determine this controversy.

Dated this November 16, 1915.

J. F. McKEEL,
Defendant in Error, pro se.

169 [Endorsed:] 632/24915. Stipu. as to printing record.

170 [Endorsed:] File No. 24,915. Supreme Court U. S., October term, 1915. Term No. 632. Perry G. Lanham, Adm'r, etc., Pl'ff in Error, vs. J. F. McKeel. Stipulation as to parts of record to be printed. Filed November 26, 1915.

Endorsed on cover: File No. 24,915. Oklahoma Supreme Court. Term No. 245. Perry G. Lanham, as adm'r of the estate of Mary J. Lanham, deceased, et al., plaintiffs in error, vs. J. F. McKeel. Filed September 13, 1915. File No. 24,915.

[redacted]

[redacted]

PERRY C. LANHAM, as Administrator of the Estate of MARY J. LANHAM, Deceased, et al.,

Plaintiffs in Error,

vs.

J. P. McKEE, ... Defendant in Error.

(No. 313.)

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR PLAINTIFFS IN ERROR.

ORION L. RIDER,
GEO. E. RIDER,
E. S. HURT,
Attorneys for Plaintiffs in Error.

SUBJECT INDEX.

INDEX TO AUTHORITIES.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 245.

PERRY G. LANHAM, as Administrator of the Estate of MARY J. LANHAM, Deceased, *et al.*,
Plaintiffs in Error,

vs.

J. F. McKEEL, - - - - - - *Defendant in Error.*

(24,915.)

IN ERROR TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA.

BRIEF *of* PLAINTIFFS *in* ERROR.

Statement of the Case.

This case comes to this court on writ of error to the Supreme Court of the State of Oklahoma, which court affirmed the judgment of the District Court within and for Marshall County, Oklahoma.

The plaintiffs in error, as plaintiffs in said District Court, on October 13, 1910, filed their petition alleging that the defendant was unlawfully withholding from them the north half of the south half of the northeast quarter of section 15, township 6 south, range 5 east, Marshall County, Oklahoma, and prayed judgment for the possession of said premises, and for damages. (Tr., pp. 9, 10.)

On November 10, 1910, the defendant filed his answer in said District Court in which he alleged "that the land in controversy in this cause was allotted to Mary Jane Lanham as a part of her surplus allotment; that on March 13, 1908, Dana H. Kelsey, U. S. Indian Agent, made an order removing the restrictions upon alienation of the allotment of Mary Jane Lanham and said order was by the Secretary of the Interior approved March 26, 1908, to be effective thirty days thereafter; * * * and that thereafter, on, to-wit, April 25, 1908, when said order was in full force and effect, the said Mary Jane Lanham sold said land by her warranty deed to C. H. Ennis; * * * that C. H. Ennis afterward sold said lands to S. S. McDonald and G. W. Cox, who in turn afterwards sold it to this defendant; that this defendant is therefore the legal and equitable owner of said lands and in full possession and enjoyment thereof, and plaintiffs have no interest in said premises." (Tr., p. 11.)

The order removing restrictions, referred to in said answer, was attached thereto as an exhibit, and is as follows:

" DEPARTMENT OF THE INTERIOR,
" UNITED STATES INDIAN SERVICE,
" *Union Agency.*
" Muskogee, Oklahoma, March 13, 1908.
"Number 6838. Roll No. 1074.

"In the matter of the application of MARY JANE LANHAM, a Citizen by blood of the Chickasaw Nation, for the Removal of the Restrictions upon the Sale of Her Allotment, Except homestead.

" In accordance with the regulations approved by the Secretary of the Interior, May 12, 1904, in conformity to the provisions of the Act of Congress approved April 21, 1904 (33 Stats. 204), I have made a full investigation in connection with the application of Mary Jane Lanham, a citizen by blood of the Chickasaw Nation for the removal of the restrictions upon the alienation of her allotment (except her homestead) and am, as the result of that investigation, satisfied that the removal of restrictions upon the alienation of her allotted lands, except her homestead, will be for the best interests of the allottee, and I so recommend. The approval of this certificate does not in any manner determine the right of the allottee to any particular tract of land.

" DANA H. KELSEY,
" *United States Indian Agent.*

" DEPARTMENT OF THE INTERIOR,

" Washington, D. C., March 26, 1908.

"APPROVED: This approval to be effective thirty days from date.

" JESSE E. WILSON,

"(Tr., p. 12.) *Acting Secretary of the Interior.*"

To the answer a demurrer was filed by the plaintiffs, which was by the court overruled (Tr., p. 14). Thereupon the plaintiffs filed their reply (Tr., pp. 14 and 15).

On the trial in the District Court it was shown that Mary Jane Lanham, the allottee of the land in question, died in 1910 (Tr., bottom of page 23); that she was enrolled on the Chickasaw roll opposite Number 1074, and that she was of three-fourths Indian blood (Tr., p. 25).

The deed relied upon by defendant was attached to the answer of the defendant as Exhibit B, and is to be found in full in the transcript at pages 12 and 13. This deed purports to have been executed by the said Mary J. Lanham, of date April 25, A. D. 1908, and the certificate of the notary public of the acknowledgment is of the same date.

Upon the trial in the District Court J. E. Webb, a witness for the defendant, testified, among other things, as follows:

"I was a notary public at that time. I was present when the deed relied upon by the defendant was signed. It was signed by Mary Jane Lanham. I took the acknowledgment of Mary Jane Lanham to that deed. * * * I was there about an hour and a half * * * on the 25th of April, 1908, and the deed relied upon by the defendant in this case was executed by Mary J. Lanham on that day at that time. I left there about 1 o'clock in the afternoon, and Mary J. Lanham, before that time, on that day, executed this deed." (Tr., p. 24.)

The plaintiffs requested the trial court to instruct the jury, among other things, as follows:

"The jury are instructed if they find from the evidence that the order of the Secretary of the Interior, or his Assistant, removing the restrictions upon the alienation of the land of Mary Jane Lanham in controversy in this action was dated March 26, 1908, to be effective thirty days from said March 26, 1908, that said order removing said restrictions did not go into effect, and the said Mary Jane Lanham did not have the right or power under the law to execute a deed conveying said land, until April 26, 1908." (Tr., p. 25.)

The court refused to give this instruction (Tr., p. 25), and instructed the jury as follows:

"You are instructed that if you believe from the evidence that the said Mary J. Lanham exe-

cuted said deed conveying said lands to C. H. Ennis on the 25th day of April, 1908, or any other date subsequent thereto, then it would be your duty in that event to find for the defendant. The order of the Secretary of the Interior removing the restrictions upon the right of the said Mary Jane Lanham to alienate her surplus allotment appears to have been approved on March 26, 1908, and the deed in question purports to have been executed on April 25, 1908. The court instructs you that under the law governing the right of any allottee to alienate their lands, the said Mary J. Lanham could not alienate said lands prior to the said 25th day of April, 1908, for the reason that the restrictions had not been removed until that date, but that if said deed was actually executed by said Mary J. Lanham on the said 25th day of April, 1908, or any time thereafter, then the same conveyed said lands to the said C. H. Ennis, and the same were conveyed by the said C. H. Ennis to the defendant, and the defendant would therefore be entitled to recover in this action. But if you should find that the said deed was executed by her, but was executed prior to the 25th day of April, 1908, that in that event it would be your duty to find for the plaintiff." (Tr., pp. 25, 26.)

A majority verdict for the defendant was rendered, and judgment for the defendant was rendered by the District Court. (Tr., pp. 16, 17.)

On May 11, 1912, the plaintiffs filed in the Supreme Court of the State of Oklahoma their petition in error, and assigned, among others, the following errors:

The giving of the instruction to the jury hereinbefore set out; and the refusal to give the instruction requested by plaintiffs also hereinbefore copied in full.

The Supreme Court of Oklahoma on February 23, 1915, rendered a judgment reversing that of the trial court, but aftewrards, on May 4, 1915, on petition by defendant for rehearing, affirmed said judgment (Tr., pp. 18-21). The syllabus in the affirming opinion is as follows:

> " *1.* On March 13, 1908, the United States Indian Agent made an order removing the restrictions on alienation of the surplus lands of a Choctaw Indian of three-fourths blood, which said order was duly approved by the Secretary of the Interior on March 26, 1908, 'to be effective thirty days from date.' On April 25, 1908, she made, executed and delivered a warranty deed to said lands; *Held,* that her title to said lands was thereby conveyed,—following *Baker* v. *Hammett et al.,* 23 Okla. 480.
>
> " *2.* The word 'from,' in its literal and restricted sense generally means exclusive, but it may be used in a connection that means inclu-

sive and where, as here, the allottee could have alienated her allotment on March 26, 1908, after approval by the Secretary, but for the thirty-day limitation imposed by the approval of the Secretary, that day will be included within the thirty days." (Tr., bottom of page 19.)

ASSIGNMENT *of* ERROR.

On page 4 of the transcript will be found the assignment of error, which is as follows:

> " The Supreme Court of the State of Oklahoma erred in holding and deciding that, where the Secretary of the Interior of the United States made an order removing the restrictions upon alienation of the lands of a three-quarters blood Chickasaw Indian, which said order was dated March 26, 1908, and provided it should be effective thirty days from date, the day of the order removing said restrictions should be included in computing the thirty-day period during which the order of removal was not effective, and that a conveyance of lands by said Indian on April 25, 1908, was valid, and conveyed good title to the defendant in error, J. F. McKeel."

ARGUMENT.

As appears from the foregoing statement, Mary Jane Lanham, the Indian allottee, was of three-fourths Indian blood, and it is conceded that until the order removing restrictions upon alienation, heretofore copied in full, became effective, her lands were inalienable. The only question before this court, therefore, is whether said order had become effective on April 25, 1908, that being the date of the deed of the Indian allottee which is relied upon by the defendant in this case. Said order removing restrictions was made in pursuance of authority conferred by the Act of April 21, 1904 (33 Stat., p. 204), wherein it is provided as follows:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian Agent at the Union Agency in charge of the Five Civilized Tribes, if said agent

is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interests of said allottee. The finding of the United States Indian Agent, and the approval of the Secretary shall be in writing, and shall be recorded in the same manner as patents for lands are recorded."

In the case of *Simmons* v. *Whittington,* 27 Okla. 356, 112 Pac. Rep. 1018, decided Nov. 16, 1910, it was held as follows:

" A deed conveying or a contract for the sale of a portion of a surplus allotment made by a Choctaw Indian by blood before the removal of restrictions upon her power to alienate same, in violation of Act Cong. June 28, 1898, c. 517, par. 29, 30 Stat. 507, and of Act Cong. July 1, 1902, c. 1363, pars. 15, 16, 32 Stat. 642, 643, is void.

" The Act of Congress, approved April 21, 1904 (Act April 21, 1904, c. 1402, 33 Stat. 204), authorizing the removal of all restrictions upon the alienation of allotted lands of members of the Five Civilized Tribes by blood, except minors and except as to homesteads, upon approval of the Secretary of the Interior under such rules and regulations as he may prescribe, authorizes the Secretary of the Interior to provide by general rule that no order removing the restrictions of any such allottee shall become effective until 30 days after its date; and a deed executed by an allottee after the approval of the

order removing restrictions upon the power of the allottee to alienate, but before the expiration of 30 days from the date of such order and approval, is void."

The case of *Baker* v. *Hammett, supra,* followed by the State Supreme Court in affirming the case now before this court, was based upon the decision of this court in the case of *Taylor* v. *Brown,* 147 U. S. 640.

It is our contention that there was error in applying the decision of this court in *Taylor v. Brown* to this case, for the following reasons:

1.

In *Taylor* v. *Brown* the part of the statute construed was as follows:

> " *Provided, however,* that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor."

In that case the question was whether or not the day of the date of the patent should be included or excluded in the computation of time to arrive at

the date when the lands of the Indian in question were alienable. This court held:

> " The rule which excludes the *terminus a quo*, in the computation of time, is not absolute, but it may be included when necessary to give effect to the obvious intention."

And it was held that it was the obvious intention that the *terminus a quo* should be included in the computation, and that it was necessary in that case to so include it, for the reason that if it was not included the Indian would have the right to alienate the land on the day of the date of the patent. The language used by this court was as follows:

> " If, when the patent issued, June 15, 1880, West could have conveyed but for a specific restriction taking effect at the same moment, then that date should be included in the period of five years prescribed."

In the case now before the court there is no necessity to include the day of the date of the approval of the order removing restrictions in order to prevent the possibility of an alienation of the lands of the Indian allottee on the date of the order. In *Taylor* v. *Brown* the statute construed contained the only restriction upon the alienation of the land, as well as the limitation as to the time of such restric-

tion. In this case the restriction existed by virtue of prior laws. Therefore, when on March 26, 1908, the Secretary approved the order removing restrictions "to be effective thirty days from date," the prior restriction continued to be effective on March 26, 1908, and for every day thereafter until the expiration of the said thirty-day period. The reason for the exception to the rule not being present, we respectfully submit that the rule itself, and not the exception thereto, should govern in the determination of this case.

2.

The general rule is that the first day is to be excluded.

The case of *Baker* v. *Hammett, supra,* itself is authority to this effect. In that case, at page 485, it was said:

> " Except where different intention is manifest, the general rule is that in computing time from or after a certain day or date, the first day is to be excluded and the last included to complete the period."

Lewis' Sutherland Statutory Construction (2d ed.), 1904, Sec. 184, is cited by the court in support of this rule.

This court has also held to the same effect. In the case of *Sheets* v. *Selden*, 2 Wall. 177, we find the following:

> " Where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, the day thus designated is to be excluded, and the last day of the specified period is to be included."

In *Best* v. *Doe*, 18 Wall. 112, 21 L. ed. 805, it was said:

> " Another objection is taken to the certificate of Edmondson, on the ground that when it was given his term of office had expired. This objection can not be sustained, for the certificate bears date the 2nd of March, 1849, and he was commissioned to hold office of register 'during the term of four years from the 2nd day of March, 1845.' The word 'from' always excludes the day of date."

In *Bemis* v. *Leonard*, 118 Mass. 502, 19 Am. Rep. 470, the rule is stated as follows:

> " In computing time from the date, or the day of the date, or from a certain act or event, the day of the date, act, or event is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises."

The English and American cases are reviewed by the court in the case from which we have just quoted. We call attention to an illustration, cited in that case, in the English case of *Ex parte Fallon:*

> " Suppose the direction of the act had been to enroll the memorial within one day after the granting of the annuity; could it be pretended that that meant the same as if it were said that it should be done on the same day on which the act was done? If not, neither can it be construed inclusive, when a greater number of days is allowed."

And also to the following:

> " The *terminus a quo* mentioned in the act is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *sixty days after* is descriptive of another and subsequent period, which begins when the first period is completed."

The court also quotes the case of *Bigelow* v. *Wilson,* 1 Pick. 485, wherein it was said "That no moment of time can be said to be after a given day until that day has expired."

In the case of *Warren* v. *Slade,* 23 Mich. 1, 9 Am. Rep. 70, we find the following:

> " So in *Pellew* v. *Inhabitants of Womford,* 9 B. & C. 134, where the riot act required notice

> of damage of injury to be given 'within two days after such damage or injury done,' the day of the injury was held to be excluded, and a rule was applied by Lord Tenterden which is called by subsequent judges a very reasonable test to apply, *viz.:* by reducing the time to *one* day, in which case the party would clearly be entitled to the whole of the next day in which to give notice, otherwise he might have no time at all."

Suppose in this case the order of the Secretary of the Interior had read "Effective one day from date". Could it be said, in that event, that it became effective immediately upon the signature of the Secretary being written? If not, in computing time when thirty days is involved, would not the same method of computation necessarily be used as for one day?

In Anderson's Law Dictionary, page 312, we find the following:

> " It has become the rule, in the construction of a contract, when the time to be computed is one or more days, weeks, or years, to exclude the day of the date or event, whether by the contract the time is to be reckoned from date, from the day of the date, or from some act or event. The day is not divided, because not only is a day a natural unit of time, but it is a fair presumption that the parties did not intend to di-

vide a day, since the time to be computed is made up of days as units of time; and the day is excluded because to include it would require an act, which, by the contract, was to be done in one day from date, to be done on the day of the date, which is against the apparent intention of the parties."

In *Weeks* v. *Hull*, 10 Conn. 376, 50 Am. Dec. 249, it was held:

"In computing time, the day of the act, from which future time is to be ascertained, is to be excluded. This rule applies to every instrument or contract, and also to the construction of statutes and all proceedings under them."

In *Maxwell* v. *Jacksonville Loan & Improv. Co.*, 45 Fla. 425, 34 So. 255, the decision in *Bemis* v. *Leonard, supra*, was specially approved.

In *Brooklyn Trust Co.* v. *Hebron*, 57 Conn. 22, it was held that a warning of a town meeting on the 26th to be held on the 30th, did not give statutory five days' notice.

In *Stewart* v. *Meyer*, 54 Md. 454, it was held that a statute requiring 30 days' notice of sale for non-payment of taxes, the day of sale being after expiration of 30 days' notice, was not complied with where notice was published on March 15th and sale took place on April 14th.

In *Georgia Southern R. Co.* v. *Bigelow,* 68 Ga. 219, it was held that a railroad ticket, to be used within two days from date sold, did not expire until midnight of second day after its issuance.

In *Mc Evoy* v. *Sault Ste. Marie,* 136 Mich. 172, 98 N. W. 1006, it was held that day of injury should be excluded in computing time within which claim for injury caused from defective highway must be presented.

In several of the states the rule for computation of time is fixed by statute. It is so fixed in Oklahoma. Section 5341, Revised Laws 1910, provides as follows:

> " When time is to be computed from a particular day, or where an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day and include the last."

The Supreme Court of Oklahoma, in this case, no doubt on the ground that the decision of this court was ultimate authority upon the question involved herein, followed (and erroneously, as we think we have shown) *Taylor* v. *Brown, supra,* instead of the Oklahoma statute.

In addition to those we have already cited, we call attention to the following authorities upon this question:

Campbell v. *Ruble*, (Okla.) 135 Pac. 1050;

Berger-Adams Co. v. *Walker Bros.*, (Okla.) 155 Pac. 587;

Frey v. *Rhode Island Co.*, (R. I.) 91 Atl. 1;

McFarland v. *Moore*, 32 App. Dist. Col. 213;

In re Babjak, 211 Fed. 551;

Price v. *Russell*, (Ky.) 159 S. W. 573;

Law v. *Northern Assur. Co.*, (Calif.) 132 Pac. 590;

Feulason v. *Shedd*, (Me.) 84 Atl. 409;

Peay v. *Pulaski County*, (Ark.) 148 S. W. 491;

Oberhouse v. *State*, (Ala.) 55 So. 898;

Headen v. *Headen*, (Ala.) 54 So. 646;

Arnold v. *Bond*, (Iowa) 130 N. W. 816;

East Tenn. Tel. Co. v. *Board*, (Ky.) 133 S. W. 564, 136 S. W. 138;

Holt v. *Richardson*, (Ga.) 67 S. E. 798;

Rody v. *Fire Ins. Patrol*, (La.) 52 So. 491;

Le Clair v. *Hawley*, (Wyo.) 102 Pac. 853;

Bubbs v. *Frey*, (Minn.) 117 N. W. 158;

State v. *Elson*, (Ohio) 83 N. E. 904.

For the reasons given we respectfully submit that this case should be reversed.

ORION L. RIDER,
GEO. E. RIDER,
E. S. HURT,
Attorneys for Plaintiffs in Error.

No. 245.

In the

Supreme Court of the United States.

October Term, 1916.

PERRY G. LANHAM, as Administrator of the Estate of MARY J. LANHAM, Deceased, *et al.*,
Plaintiffs in Error.

VERSUS

J. F. McKEEL, - - - - - - *Defendant in Error.*
(24915)

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF DEFENDANT IN ERROR.

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INDEX.

CASES CITED.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 245

PERRY G. LANHAM, as Administrator of the Estate of MARY J. LANHAM, Deceased, *et al.*,
Plaintiffs in Error.

vs.

J. F. McKEEL, - - - - - - *Defendant in Error.*

(24915)

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *for* DEFENDANT *in* ERROR.

Brief of Argument.

The statement of the case as made by plaintiffs in error in their brief is substantially correct. There is only one assignment of error, which presents the

sole question of the proper computation of time under the order of the Secretary of the Interior, appearing at 12 of the transcript.

The land involved in this case was patented to Mary Jane Lanham, a three-fourths-blood Chickasaw Indian, as a portion of her surplus allotment, and was, prior to the order of the Secretary of the Interior, restricted.

On March 26th, 1908, the Secretary of the Interior approved the recommendation of the United States Indian Agent for the removal of the restrictions upon the alienation of the surplus allotment of Mary Jane Lanham in the following language:

> "Department of the Interior, Washington, D. C.
>
> March 26th, 1908.
>
> Approved; this approval to be effective thirty days from date. JESSE F. WILSON,
>
> *Acting Secretary of the Interior.*"

On April 25th, 1908, the allottee made, executed and delivered the deed sought to be cancelled in this case. The sole question presented in the brief of plaintiffs in error is, Had the order of the Secretary of the Interior become effective and was the land alienable thereby on the date of the deed. If the order of the Secretary of the Interior had become

effective, the land therefore would be alienable and the deed valid. If the land was restricted on the 25th of April, 1908, then the deed was ineffective to pass the title.

The authority of the Secretary of the Interior to make the order is found in the Act of Congress of April 21st, 1904 (33 Stat. 204), in the following language:

> " And all restrictions upon the alienation of lands of all of the allottees of either of the five civilized tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed; and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian Agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon a full investigation of each individual case, that such removal of restrictions is for the best interests of said allottee. The finding of the United States Indian Agent, and the approval of the Secretary, shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

The Supreme Court of Oklahoma affirmed the judgment of the District Court of Marshall County,

Oklahoma, which held that the order of removal had become effective; that the deed was valid and passed the title, and which denied the plaintiffs in error the cancellation of the deed, as prayed in their petition. The opinion of the Supreme Court, caption and endorsement omitted, is as follows (Tr., p. 20):

" ORDER OF THE COURT ON REHEARING.

By TURNER, J.:

" On October 13, 1910, in the District Court of Marshall County, Perry G. Lanham, as administrator of the estate of Mary J. Lanham, deceased, and his six minor children by himself as their guardian, plaintiffs in error, sued J. F. McKeel, defendant in error, in ejectment for the surplus allotment of Mary J. Lanham, the mother of the minors, and for $250.00 damages for its unlawful detention. For answer, after admitting the land to be the surplus allot-
157 ment of Mary J. Lanham, the mother of the minors, as stated, defendant pleaded that on March 13, 1908, Dana H. Kelsey, the United States Indian Agent, made an order removing the restrictions on the alienation of the land in question, which order was duly approved by the Secretary of the Interior on March 26, 1908, to be effective thirty days from date. He alleged that thereafter, to-wit, on April 25, 1908, when said order was in full force and effect, said Mary J. Lanham sold and conveyed said land by warranty deed to one Ennis from whom he deraigned title, in virtue of all of which he says

plaintiffs are not entitled to recover. After a general demurrer thereto filed and overruled, plaintiffs replied by a general denial and alleged that the deed from Mary J. Lanham to said Ennis was a forgery. After one continuance had at the request of plaintiffs, they, on November 16, 1911, made another application to continue the cause, which was overruled. There was trial to a jury and judgment for defendant and plaintiffs bring the case here. Both sides concede that the mother was a three-fourths-blood Choctaw Indian and that the land in controversy was inalienable because of the Act of Congress approved April 21, 1904, unless the restrictions upon its alienation were removed by order of the Secretary of the Interior. As we see no reason to disturb the finding of the jury that the deed from Mary J. Lanham to Ennis of date April 25, 1908, was not a forgery, the order removing restrictions upon the alienation of the land described therein being approved March 26, 1908, 'to be effective thirty days from date,' was the deed effective to pass title? It was, for the reason that inclusive of the day of the approval of the order removing restrictions thirty days had expired at the time the deed was executed. And such day should be included in computing the thirty-day period during which the order of removal was not effective.

" Such was in effect our holding in *Baker* v. *Hammett et al.*, 23 Okla. 480, following *Tay-*
158 *lor* v. *Brown*, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. ed. 313. Speaking to that case this court said:

> " 'The theory upon which the Supreme Court of the United States held that the day of the date that the patent was issued should be included seems to be that except for the limitation taking effect, at the same moment with the delivery of the patent, the patentee could have alienated the land in receipt of the patent.'
>
> " And so we say that, as the allottee in this case could have alienated her allotment on March 26, 1908, after approval but for the thirty-day limitation imposed in the approval of the Secretary, the case falls squarely within the reason of the rule announced on those cases. It follows that the judgment of the trial court was right, and finding no error in the record, the same is affirmed.
>
> " All the justices concur."

It will be observed that the decision in the instant case is based upon the opinion of the court rendered in *Baker* v. *Hammett et al.*, 23 Okla. 480, which is found upon the decision of this court in the case of *Taylor* v. *Brown*, 147 U. S. 640. Inasmuch as the opinion in the instant case rests upon the decision of the State Court in *Baker* v. *Hammett*, we ask the court's indulgence in quoting extensively from the body of the opinion in that case. The court said:

> " On this subject in a case where very full consideration is given it, *Taylor* v. *Brown*, 5 Dak. 335, 349, 40 N. W. 525, 530, Justice THOMAS said:

" 'We do not claim that there is a uniformity of decisions of courts of this country in regard to this question, but we admit there is somewhat of conflict; but from a thorough examination of them we arrive at the following conclusion: That there is no absolute or well-settled rule of computation, but that courts will always adopt that construction which will uphold and enforce, rather than destroy, bona fide transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties the *dies a quo* will be included, otherwise they will be excluded. We think that the word "from" in its literal and restricted sense means "exclusive," but it may be used in connection that means inclusive, and it is quite frequently used in the latter sense; and, therefore, in construing it courts will take into consideration the context and subject-matter, and construe it to mean either inclusive or exclusive, accordingly as it is influenced by its connection.'

" This case is similar to the case at bar, in that there is involved therein the construction of an Act of Congress relating to the alienation by Indians of their lands received under and by virtue of its terms. The facts out of which the controversy arose are stated, and the portion of the statute involved is quoted by the court as follows:

" 'On the 15th day of June, 1880, one Thomas K. West, a Santee Sioux Indian, be-

came the owner of the lands described in the pleadings by a patent from the United States. The said West, being an Indian, received his title under the provisions of the statute of the United States, giving certain Indians who should abandon their tribal relations the right to enter and hold lands under the homestead law. The statute above referred to contains the following proviso: "*Provided*, however, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for the period of five years from the date of the patent therefor." Act of March 3, 1875, ch. 131, Sec. 15, 18 Stat. 420 (U. S. Comp. St. 1901, p. 1419).'

" The Indian, West, made two deeds to the land, one on the 15th day of June, 1885, and the other on the 17th day of June, 1885, and the question before the court was: Which of these deeds was valid and conveyed title? It will be observed that this depended upon the construction to be placed upon that portion of the act which provided that the title to the lands acquired thereunder should 'be and remain inalienable for a period of five years from the date of the patent issued therefor.' And the court in construing this statute included the day of the date of the patent, and decided that the deed made on the 15th day of June, 1885, was a valid and legal conveyance of the land, and that that

day was not within the period of limitation provided for by the statute. This case was appealed to the Supreme Court of the United States and is reported in 147 U. S. 640, 13 Sup. Ct. 549, 37 L. ed. 313. That court in affirming the Supreme Court of the Territory of Dakota held:

> " 'In computing the time during which the alienation of public lands acquired by an Indian under the provisions of section 16 of the Act of March 3, 1875 (18 Stat. 420, c. 131; U. S. Comp. St. 1901, p. 1420), is forbidden, the day of the issue of the patent should be included.'

" The theory upon which the Supreme Court of the United States held that the day of the date that the patent was issued should be included, seems to be that except for the limitation taking effect, at the same moment with the delivery of the patent, the patentee could have alienated the land on receipt of patent. The restriction on alienation exists on the delivery of the patent and this provision of the statute was simply a continuation of the restriction which already existed. The limitation on alienation was to be and remain; that is to say, was to be on the first day not subject to alienation, and so remain until the five years had expired. In the case at bar it will be observed that the language of the act restricting alienation by the allottee is that his land should not be alienated 'before the expiration of five years from the date of the approval of this supplemental agreement,' which in our judgment so far as this case is concerned

> means the same thing as the language of the act construed by the Supreme Court of the United States providing that lands acquired thereunder should 'be and remain inalienable for the period of five years from the date of the patent issued therefor.' This construction on the part of the Supreme Court of the United States we regard as controlling, and we, therefore, hold that the deed executed and delivered on August 8, 1907, to the plaintiff in error was valid."

This court in *Taylor* v. *Brown, supra*, had under consideration an Act of Congress which read in part as follows:

> " That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance either by voluntary conveyance or the judgment, decree or order of any court and shall be and remain inalienable for a period of five years from the date of the patent issued therefor."

The patent to the allottee in that case was dated June 15, 1880, and the deed sought to be cancelled was executed June 15, 1885. If the day on which the patent was issued was to be included in the five-year period, the deed would have been executed on the first day following the expiration of the five-year period of limitation. In this case, if the day on which the order of the Secretary of the Interior was made,

to-wit, March 26th, 1908, is one of the thirty days during which the allottee could not alienate, then under a similar construction certainly the deed executed April 25th, 1908, was executed on the first day after the expiration of the thirty-day period in the order. This court, in that case, in the syllabus says:

> " In computing the time during which the alienation of public lands acquired by an Indian under the provisions of section 16 of the Act of March 3rd, 1875, c. 131 (18 Stat. 402), is forbidden, the day of the issue of the patent should be included."

In the body of the opinion it is said:

> " The question upon the disposition of which the decision of the Supreme Court of the territory was based, and which we are first to consider, arises upon the proper construction of the proviso to the fifteenth section. The restraint on alienation was to continue for a period of five years. Was it the intention that the computation of time should include the day of the issue of the patent? If so, the deed of June 15, 1885, was not invalid, and the decree must be affirmed."

The court answers this question as follows

> " The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and

the grantee forfeit his estate by violating it (L Prest. Est. 477), and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupilage and entitled to special protection *(Pickering* v. *Lomax,* 145 U. S. 310; *Felix* v. *Patrick,* 145 U. S. 317, 330), yet the proviso in question may fairly be held to have been adopted in view of general principles. *If, when the patent issued, June 15, 1880, West could have conveyed but for a specific restriction taking effect at the same moment, then that date should be included in the period of five years prescribed.* The proviso is that the title shall not be subject to alienation in the various ways described, and shall be and remain inalienable for a period of five years from the date of the patent. Possibly the language is susceptible of being construed to mean that the land should be inalienable on the day of the issue of the patent and for five years after that date, two periods of time, but we are of the opinion that the more natural and the true construction is that only one period is referred to, and that the day the patent issued should not be excluded. *The limitation on alienation was to be and to remain, that is to say, the land was to be on the first day not subject to alienation, and so to remain until the five years had expired.* The protection of the Indian against the improvident disposition of his property was fully attained in the judgment of Congress by fixing the period of five years, and no reason is perceived why any more than that time should be assumed to have been within the legislative contemplation.

> " *The power to alienate came with the patent and the restriction for the period named was carefully drawn to operate eo instanti, that is, to commence in its entirety coincidently with the possession of the power.*"

Counsel for plaintiffs in error in their brief say:

> " Suppose in this case the order of the Secretary of the Interior had read 'effective one day from date'; could it be said in that event that it became effective immediately upon the signature of the Secretary being written?"

We answer, if the order was made on Wednesday, effective one day from date, would counsel contend that it did not become effective until Friday, the second day from its date? Certainly not. Then why contend that it is not effective on the thirtieth day from date? If no limitation had been inserted in the order, it would have become effective immediately upon its signature.

In determining the proper method of computation of time, the courts are in hopeless conflict and it would serve no purpose to attempt to harmonize the conflicting decisions or the reasons upon which they are based. As was said by the Supreme Court of the Territory of Dakota, in the case of *Taylor* v. *Brown*, 5 Dak. 335, 40 N. W. 525:

> " The question whether the *terminus a quo* should be excluded or included is a vexed question and has been for a time 'whereof the memory of man runneth not to the contrary' and has harassed and perplexed courts and learned doctors of both the common and civil law from the earliest times down to the present day. It has been very properly termed by a distinguished writer of the Roman law the *controversia controversissima.*"

Authorities can be quoted at length where the courts have included the first day and excluded the last, and where they have excluded the first and included the last, but so far as our investigation has disclosed, no case has yet been found where both dates were excluded.

The reason assigned why the date of the patent should be included, in *Taylor* v. *Brown*, both by the Supreme Court of the Territory of Dakota and by this court, is equally applicable in this case; because certainly, but for the limitation imposed by the Secretary in his order, the land was alienable on the day of the signing of the order immediately after the signature of the Secretary had been affixed.

Plaintiffs in error contend that the rule of computation of time as prescribed by the code of civil procedure of Oklahoma, section 5341, Revised Laws of 1910, which reads as follows:

> " The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded"

should be applied in this case and that by the application of this rule the date upon which the order was made should be excluded and likewise the last day should be excluded. In other words, that thirty full days must elapse exclusive of the day the order was made and the day the deed was executed. In this case, if we should concede, for the sake of argument, that this rule would be applicable, still it would avail the plaintiffs in error nothing. There are two acts, possibly, involved in this transaction; the act of the Secretary in making the approval, and the act of the Indian in making the deed. By the order the Indian was granted permission to make a deed thirty days after the order was made. If you exclude the first day, it was made upon the thirtieth day. If you include the day of the order, the deed was made the thirty-first day. However, the rule of construction which is prescribed applies to matters arising under the code of civil procedure and would not be a statutory rule of construction applicable under all conditions even though it should be conceded that the section of the statute is not limited in its operation to procedure, yet the great weight of authority is that similar statutory provisions are not exclusive

but must give way where a different computation was intended by the legislature. This section of the statute was adopted by Oklahoma from Kansas. The rule prescribed in that statute was not followed by the Supreme Court of Kansas in *Leavenworth Coal Co.* v. *Barber*, 27 Pac. 114, wherein the court, in the second subdivision of the syllabi, says:

> " Where a statute provides that it shall take effect 'from and after its publication,' in computing the time when it takes effect the day of its publication is to be included."

Neither was it followed by the same court in the case of *Kansas City et al.* v. *Gibson et al.*, 72 Pac. 222, where it is said:

> " An attack on the validity of such assessment must be made within thirty days from the ascertainment of the cost of the improvement and in computing the time within which the action may be brought the day on which the assessment is ascertained and apportioned is to be included."

In *Budds et al.* v. *Frey*, (Minn.) 117 N. W. 158, the court had under consideration the proper construction to be placed upon a lease the term of which was from quarter to quarter from and after April 1st, 1902, and the lessee agreed to pay a rental payable quarterly in advance on the first days of January, April, July and October of each year. A notice

was served upon the lessee to surrender possession on September 30th, which was a good notice if that was the last day of the old quarter. The court said:

> " The appellant contends that as the lease was from quarter to quarter 'from and after April 1st, 1902,' the first day of the month must be excluded and that the term ended on the first day of October instead of the 30th day of September. If this construction of the lease is correct, no proper notice was given. There has been a great deal of discussion and some difference of opinion as to whether the word 'from' as applied to time and distance is to be used as inclusive or exclusive of the *terminus a quo*. The statutory rule is that, in computing the time within which an act is required or permitted to be done, the first day shall be excluded and the last included unless the last day shall fall on Sunday or on a holiday, in which case the prescribed time shall be extended so as to include the first business day thereafter. Revised Laws, 1905, section 5514, subdivision 21. *Manifestly, this cannot aid us in determining when a lease commences or terminates.*
>
> " The result of the authorities seems to be that whether the word 'from' shall be construed as inclusive or exclusive depends upon the expressed intention of the parties."

The court, after a lengthy discussion of the question and the consideration of *Pugh* v. *Duke of*

Leeds, 2 Cowp. 714, *Taylor* v. *Brown, supra*, held that the day of the date of the lease should be included.

In the case of *Stebbins* v. *Anthony et al.*, 5 Colo. 340, the court reviewed the various decisions of the courts of the United States on the vexed question and summed up its views in the syllabus as follows:

> "The general current of modern authority is that where a statute requires an act to be performed a certain number of days prior to a day named, or within a defined period after a day or event specified, or where time is to be computed either prior or subsequent to a day named, the usual rule is to exclude one day of the designated period and to include the other."

It is not questioned that the Secretary of the Interior had the authority to make the order removing the restrictions nor to insert in such order the limitation that it should become effective thirty days from date. The order of removal of restrictions having been made under authority of Congress has the force of statutory enactment.

—*United States* v. *Eaton*,
144 U. S. 688,
36 L. ed. 591;
Wilkins v. *United States*,
96 Fed. 837.

If this is true, then the same construction should be given to the order of approval as would be given to a statute.

This court, in 1815, had occasion to determine when an Act of Congress took effect, in the case of *Richmond* v. *United States*, 9 Cranch. 103. The court said:

> " The material facts are that the brig arrived within the limits of the United States on the 30th day of June, 1812, and within the collection district of Providence on the 1st day of July, 1812; on the 2nd day of July an entry was duly made at the custom house and the present bond was then executed.
>
> " The principal question which has been argued is whether on these facts the companies are liable to the payment of the double duties imposed by the act of the first day of July, 1812. Chapter 112. * * * It is contended that this statute did not take effect until the second day of July nor indeed until it was formally promulgated and published. We cannot yield assent to this construction; the statute was to take effect from its passage and it is the general rule that where the computation is to be made from the act done, the day on which the act is done is to be included."

This case, promulgating the proper method of computation, has been followed in perhaps a hundred

cases and has never, so far as our investigation discloses, been denied. In fact this court, recognizing the general rule that the statute takes effect from the date of its approval unless a different time is fixed by law, has held that where justice requires, the true time of its passage may be shown even to the hour of the day.

—*La Peyre* v. *United States*,
17 Wall. 191,
21 L. ed. 606;
Louisville v. *Portsmouth Savings Bank*,
104 U. S. 469,
26 L. ed. 775;
Gardner v. *Barney, Collector*,
6 Wall. 499,
18 L. ed. 890.

Under this rule, the very hour of the approval of the Act of April 21st, 1904, could be shown to sustain the validity of a deed executed subsequent to the approval of the act by an allottee whose restrictions were removed by the act. If that act took effect immediately upon its approval and operated to remove the restrictions from the allottees not of Indian blood, then but for the thirty-day limitation in the order in the instant case, the restrictions would have been removed immediately upon the signing of the order.

The true rule of construction applicable alike to statutes and contracts is to arrive at the true meaning and intent of the legislature in the one instance and of the parties in the other and give such construction as will sustain valid transactions and carry out the intent of parties. In thus discussing the question of the inclusion or exclusion of the *terminus a quo*, this court, speaking through Mr. Justice GRIER, in the case of *Griffith* v. *Bogart*, 59 U. S. 18 How. 158, 163, 15 L. ed. 307, expressed its views in the following forcible language:

> " It would be tedious and unprofitable to attempt a review of the very numerous modern decisions or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction or title. The intention and policy of the enactment should be sought for and carried out. Courts should never indulge in nice grammatical criticisms of prepositions or conjunctions in order to d e s t r o y rights honestly acquired."

The views thus expressed have been adopted, and this case has been followed and cited by the courts of numerous states and has never been questioned or repudiated.

In *Pugh* v. *Duke of Leeds*, 2 Cowp. 714, cited by this court with approval in *Griffith* v. *Bogart, supra, Taylor* v. *Brown, supra*, and numerous other cases, which is the leading case in the English courts and which has remained the proper exposition of the vexed question, it is said, in the able opinion delivered by Lord Mansfield:

> " I will first consider it as supposing this is a new question, and that there never had existed any litigation concerning it. In that light the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease; the law, no technical form. All that is required is only enough to show that it is a lease in possession, and not in reversion; and therefore, if the words used are sufficient for that purpose, the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always depend upon the context and subject-matter, whether it be construed exclusive or inclusive of the *terminus a quo*. While the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive' or 'exclusive,' the matter would have been very clear. If they had said 'from the day of the date, inclusive,' the term would have commenced imme-

diately. If they had said 'from the day of the date, exclusive,' it would have commenced the next day. But let us see whether the context and subject-matter in this case do not show that the construction here should be inclusive as demonstratively as if the word 'inclusive' had been added. This is a lease made under a power. The lease refers to the power, and the power requires that the lease should be a lease in possession. The validity of it depends upon its being in possession, and it is made as a provision for an only daughter. He must therefore have intended to make a good lease. The expression, then, compared with the circumstances, is as strong in this respect, of what his intention was, as if he had said, 'I mean it as a lease in possession,' or 'I mean it shall be so construed.' If it is so construed, the word 'from' must be inclusive. This construction is to support the deeds of the parties, and give effect to their intention, and to protect property. The other is a subtlety to overturn property and defeat the intention of the parties, without answering one good end or purpose whatever. To conclude, the grounds of this opinion and judgment which I now deliver is that 'from' may in vulgar use, and even in the strictest propriety of language, mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense, which made their deed effectual."

In the late case of *Le Clair* v. *Hanley et al.*, 102 Pac. 853, cited by the plaintiffs in error, the Wyoming court had under consideration the proper com-

putation of time in relation to Acts of Congress pertaining to public lands, and after an exhaustive investigation and review of the authorities, summed up its conclusions in the first subdivision of the syllabi, which is as follows:

> "Act Cong. March 3, 1905, c. 1452, 33 Stat. 1016-1022, provided that the lands of the Shoshone Indian Reservation open for settlement should be disposed of under the homestead, townsite, coal and mineral land laws, and should be opened to entry by proclamation of the president, describing the manner of entry and forbade any entry on said lands except as provided in said proclamation until sixty days from the time when the same are opened to entry. The president declared that on and after August 15, 1906, the lands should be open to entry, and provided for registration of persons qualified to enter such lands, to be followed by a public drawing during the sixty days following the opening. The proclamation further provided that, after sixty days from the time the lands were opened to entry, any lands undisposed of might be entered under the homestead, townsite, coal and mineral land laws of the United States. *Held*, that, in computing the sixty-day period during which entry under the land laws of the United States was suspended, the opening day, August 15, 1906, should be counted, so the period expired at midnight on October 13, 1906, and that an entry on October 14, 1906, of a mineral claim on lands not disposed of during the sixty days preceding was valid."

It will thus be seen from a review of all of the authorities of the state courts and of this court that the conclusions reached by the Supreme Court of Oklahoma and the rule announced by it in the instant case are in harmony with the great weight of authority and are certainly consistent with the layman's views of what is just and right.

For more than ten years the Secretary of the Interior, under the Act of April 21st, 1904, has been removing restrictions by orders substantially, if not exactly, in the language of the order involved in this case, with the thirty-day limitation included. The decision of the Supreme Court of Oklahoma, in *Baker* v. *Hammett, supra,* was rendered in March, 1909. During this time thousands of acres of land have been deeded by allottees under such orders and countless numbers of the deeds have been made under the computation of time contended for in this case. Hundreds of thousands of dollars have been invested upon the construction of the order as made by the Supreme Court of Oklahoma, so that it can be contended upon every ground of justice and right that the decision of this court in *Taylor* v. *Brown, supra,* is in reality a rule of property in the State of Oklahoma.

Again, despite the large number of deeds that have been executed by allottees as in this case, and

notwithstanding the proper persistent activity of the Department of the Interior and the Department of Justice in the prosecution of suits to cancel deeds and conveyances made in violation of restrictions, as evidenced by the records of this court in its decisions in the numerous land cases brought from Oklahoma, in no single instance has the validity of such a deed been attacked. More than a decade has passed since the Secretary inaugurated the system of removing restrictions under orders as made in this case, and during all of that time the Secretary of the Interior and the Department of Justice have acquiesced in this construction. The Department of the Interior and the Department of Justice are the two departments under the law which are vested with the power to protect the wards of the Government from alienating their land in violation of lawful restrictions thereon. If they had not acquiesced in this construction, is it not clear that they would have taken steps to cancel deeds made as in this case. This then being the rule of construction of the Departments of the Government vested with the jurisdiction in the administration of the law, we can consistently invoke the rule of departmental construction under the authority of this court laid down in the case of *Harn* v. *United States*, 107 U. S. 402, 27 L. ed. 527, where its views are thus expressed:

> " Such construction did not appear to it unreasonable and might well have been urged in the exercise of sound judgment and without regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this court in *United States* v. *Pugh*, 99 U. S. 265, that 'in the case of a doubtful and ambiguous law, contemporaneous construction of facts have been called upon to carry it into effect' is entitled to great respect. *Edwards* v. *Darby*, 12 Wheat. 210, and where this court refuses to interfere with such construction after it had been acted upon for a long time." (Citing numerous authorities.)

The amount involved in this particular case may not be great but the principle involved is of the utmost importance to the people of Oklahoma who have titles based upon deeds executed on the computation of time as in this case. It is likewise of the utmost importance to the State of Oklahoma, the School Land Department of which has loaned large sums of money secured by mortgages upon this class of titles. For this court at this late date to sustain the rule of construction contended for by plaintiffs in error will create havoc and chaos and accomplish no good purpose.

Plaintiffs in error in their brief admit that the authorities are badly divided upon the proper con-

struction to be given the language of the order. This then being admitted, we confidently invoke the rule announced by this court in *Griffith* v. *Bogart*, *supra*,

> "where the construction of the language of a statute is doubtful, the court will always prefer that which will confirm rather than destroy any bona fide transaction or title."

We insist that there is nothing in this case nor in any of the authorities cited by counsel for plaintiffs in error which would justify this court in reversing the judgment appealed from and in thus destroying a countless number of bona fide transactions and invalidating numerous titles in this state. We therefore most respectfully insist that the judgment of the Supreme Court of Oklahoma is right and should meet the unqualified approval of this court.

Respectfully submitted,

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